United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-1191

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P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

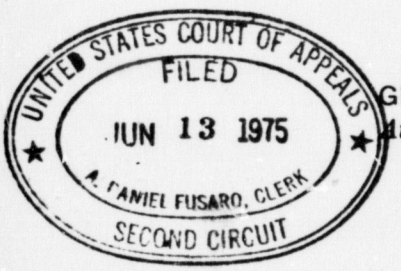
v.

QUINTEN WENDELL SKIPWITH,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

Appellant's Brief



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

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QUINTEN W. SKIPWITH,

Defendant-Appellant.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Quinten Skipwith appeals from a judgment of conviction rendered on March 13, 1975, upon a trial by jury in the United States District Court for the Southern District of New York, Hon. Dudley B. Bonsal, presiding.

STATEMENT OF FACTS

Indictment 74 Cr. 820, filed August 21, 1974, charged Mr. Skipwith, in Count One, with conspiring to obstruct the enforcement of the Criminal Laws of the State of New York, in violation of Title 18, United States Code, Section 1511; and in Count Two, with operation of an illegal gambling business, in violation of Title 18, United States Code, Section 1955.

Mr. Skipwith entered a plea of not guilty to both counts at his arraignment on September 3, 1974.

On March 6, 1975, a trial by jury was commenced, Hon. Dudley B. Bonsal presiding.

On March 13, 1975, upon conclusion of trial and due deliberation, a jury verdict was rendered, finding Mr. Skipwith not guilty on Count One, and Guilty on Count Two.

On April 28, 1975, Mr. Skipwith was duly sentenced by the Hon. Judge Bonsal to a two year term of imprisonment, six months of which is to be served in a jail type institution. The execution of the balance is to be suspended, and Mr. Skipwith is to be placed on probation for a period of two years following his release. In addition, Mr. Skipwith's sentence is to include a $10,000.00 committed fine.

On April 28, 1975, Mr. Skipwith's counsel filed Notice of Appeal with the District Court, and Mr. Skipwith has been released on his own recognizance pending said appeal.

Count Two of the Indictment charges:

> From on or about June 1, 1970[1] and continuously thereafter, up to and including December 31, 1971, in the Southern District of New York and elsewhere, Quentin Wendell Skipworth,[2] the defendant, unlawfully, willfully and knowingly did conduct, finance, manage, supervise, direct, and own all and part of an illegal gambling business as defined in Title 18, United States Code, Section 1955 (b), to wit, a policy gambling business in violation of New York State Penal Law.

Title 18, United States Code, Section 1955 (b), outlines the government's burden of proof regarding this aforesaid gambling business, as follows:

> (b) As used in this Section —
>
> (1) "illegal gambling business" means a gambling business which —
>
> (i) is a violation of the law of a State, or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct,

---

1. While the period of indictment commences June 1, 1970, Title 18 USC, Section 1955 was not added until October 15, 1970, and the period was amended at trial to reflect this.

2. It should be noted that appellant's name appears misspelled throughout the proceedings in the Court below. The correct spelling is: Quinten Wendell Skipwith.

finance, manage, supervise, direct or own all of part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day.

In order to sustain this burden of proof, the government introduced the testimony of six gamblers from the Newburgh area: Allen, Davis, Wilkins, Griffin, Crews and Williams (A-1 to A-135); the testimony of Senior Investigator Joseph Tripodo, of the New York State Police, Troop F, Bureau of Criminal Investigations, who specializes in gambling investigations in the Newburgh area (A-145-157, A-166-190); and the testimony of Special Agent T.C. Whitcomb, Jr., of the Federal Bureau of Investigation, Unit Chief of gambling operations for the Laboratory Division (A-191 to A-225).

Investigator Tripodo's testimony centered on the arrest of Mr. Skipwith on *May 12, 1972*, a date subsequent to the period of indictment, for promotion of gambling, and the arrests, three days later, of Griffin and Crews, for possession of gambling records. During the course of his testimony, gambling records seized during these separate arrests were offered in evidence, and accepted, over defense counsel's objection, subject to connection. [Skipwith records: Government's Exhibit 27, (A-151), Griffin and Crews records: Government's Exhibit 28 (A-154), Government's Exhibit 29 (A-156), and Government's Exhibit 30 (A-157)]

Agent Whitcomb's testimony was used ostensibly to substantiate the connection between these 1972 arrests and seized gambling records, and the period covered in the indictment before the Court below, by means of expert analysis of the aforesaid gambling records. This analysis concluded that there was a relationship between the 1972 Skipwith records (Government's Exhibit 27) and the 1972 gambling records found with Griffin and Crews (Government's Exhibits 28, 29 and 30), depicting an illegal gambling operation ongoing in May of 1972. (A-205-206, A-209-212, A-214-215)

Also offered in evidence, and accepted over defense counsel's

objection, was the Orange County Court record of Mr. Skipwith's plea and sentence stemming from the aforesaid 1972 arrest (Government's Exhibit 31, A-228-231)

ARGUMENT

The Argument for Appeal consists of the following points:

Point One: That it was error for the Court below to admit evidence of other crimes committed by Appellant, on the grounds that said evidence was without probative value and highly prejudicial to appellant's defense.

Point Two: That it was error for the Court below to admit in evidence factual information and gambling records pertaining to appellant's 1972 arrest, on the grounds that there was no connection established between said evidence and the indictment charged, and introduction of this evidence served only to prejudice appellant's defense.

Point Three: That appellant's conviction is contrary to the weight of the evidence in that the Government failed to sustain the burden of proof controlled by Title 18 USC, Section 1955.

POINT I

IT WAS ERROR FOR THE COURT BELOW TO ADMIT EVIDENCE OF OTHER CRIMES COMMITTED BY THE APPELLANT ON THE GROUNDS THAT SAID EVIDENCE WAS WITHOUT PROBATIVE VALUE, AND HIGHLY PREJUDICIAL TO APPELLANT'S DEFENSE.

During the trial before the Court below, the Government offered evidence of Mr. Skipwith's plea and sentence stemming from his arrest in May,. 1972, for promotion of gambling, which was admitted over defense counsel's objection (A-228-231). The Court, thereafter, charged the jury that this evidence could only be considered in considering appellant's knowledge and intentions back in the periods covered in the indictment (A-232).

Recognizing the dangers of admitting proof of other crimes as evidence in order to prove elements of the crime charged, the Courts have restricted this practice. Such evidence may severely prejudice a defendant by the confusion of issues, or the likelihood that the jury may illogically assume that since the defendant has committed one offense, he may, for that reason alone, be guilty of another. The Federal Courts have established as a "Universal Rule" the principle that "evidence of the commission of a wholly separate and independent crime is not admissable as a part of the case against the defendant" 2 C. Wright, *Federal Practice and Procedure*, Criminal Section 410, at 123. Nevertheless, the Courts have proceeded to carve out a number of exceptions to this Rule,.admitting evidence of other crimes to prove some elements of the crime for which the defendant is being tried. See 1 J. Wigmore, *Evidence*, Section 217, at 718-19 (3d. ed. 1940), where Professor Wigmore describes the most common avenues for admitting evidence of other crimes as:

> *Capacity* (physical strength or the like):
> On a charge of placing a large stone on a railroad track, the previous felonious placing of a rail on the track shows the defendant's strength — capacity for the act;
>
> *Habit or Custom:* to show a habit of omitting a signal at a railroad-crossing, previous instances of its omission are relevant;
>
> *Design or Plan:* to show a plan to rob a safe, the stealing of the key would be relevant; or to show a plan to murder a whole family and obtain their insurance money, the killings of other insured members of the family would be admissable;
>
> *Knowledge or belief:* to show knowledge of the counterfeit quality of a bank-bill, a former unsuccessful attempt to pass a similar one is relevant;
>
> *Intent:* to show intentional falsification of accounts, former incorrect entries of a similar sort tend to negative mistake;

Motive: to show a probable desire in a husband to get rid of his wife, an adulterous relation with another woman is relevant;

Identity: to assist in identifying a murderer, the commission of another murder by the defendant is relevant, if it appears that the same person committed both.

In the case at bar, the Court indicated it would permit introduction of Mr. Skipwith's arrest in May, 1972 for promotion of gambling, and his subsequent plea and sentence, for the jury to consider on the elements of knowledge and intent. (A-162). In charging the jury, the Court again stated that appellant's 1972 conviction for promoting gambling should only be considered "in considering his knowledge and intentions back in the period covered in this indictment, 1970 and 1971" (A-232). The Court then added: ". . . [Y]ou can consider that evidence only on considering his intentions on the previous occasions" (A-232).

Evidence of similar acts by a defendant is admissible to prove his knowledge, intent or design if knowledge, intent or design is placed in issue at trial either by nature of the facts sought to be proved by the prosecution, or the nature of the facts sought to be established by the defense. *U.S. v. DeCicco,* 435 F.2d 478, 483 (2d Cir. 1970). The Government's Memorandum of Law, (A-233-239), presented at trial in support of introduction of other crimes evidence cites numerous cases where elements such as knowledge, intent, willfullness, etc. were in dispute, and therefore an issue at trial. It is respectfully submitted that, in the case at bar, appellant's knowledge and intent were never placed in issue at trial before the Court below.

The Court's attention is directed to *U.S. v. San Martin,* 505 F.2d 918 (5th Cir. 1974) in which the Court spells out the following threshold prerequisites for the admissibility of other crimes evidence:

1. Proof of the prior *similar* offense must be "plain, clear and convincing";

2. The offense must not be too remote in time to the alleged crime;

3. The element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the instant case;

4. There must be a substantial need for the probative value of the evidence provided for by the prior crime.

"If all these prerequisites are satisfied", the Court added, "and if it appears on balance that the need for such evidence outweighs the prejudicial effect it is likely to have, then the evidence is admissable. . . . *San Martin,* at 921-922.

While in *San Martin,* the Court was concerned with evidence of *prior* crimes, the same rationale is applicable to *subsequent* crimes. In the case at bar, it is respectfully submitted that prerequisites "3" and "4" above were not satisfied. Knowledge and intent were not in issue at trial before the Court below, nor was a substantial need for the probative value of the evidence established by the Government. Moreover, balancing the prosecution's need for this other crime evidence against the danger that the jury might conclude illogically that because Mr. Skipwith pleaded guilty to a similar crime committed some five months after the period of indictment, then he must be guilty of the crime charged before them, it is respectfully submitted that the prejudical effect greatly outweighed the probative value of the evidence.

U.S. v. Goodwin, 492 F.2d 1141 (5th Cir. 1974), is a case similar to the one at bar. The Court held that evidence of defendant's apparent possession or importation of marijuana offshore, nine months after his alleged participation in conspiracy to import, and importation of marijuana, was not shown to serve any proper judicial or prosecutorial function outweighing its prejudical effect, and admission thereof constituted prejudical error. Upon conclusion of the government's agent testimony in *Goodwin,* the trial Court instructed the jury that it was to consider the testimony of the arresting agents "solely for the purpose of going to willfulness and intent." *Goodwin,* at 1148. Although these were elements of the crime charged, willfulness and intent were never seriously

disputed at the *Goodwin* trial, just as knowledge and intent were never disputed in the case at bar. Unless these elements are disputed at trial, the general exclusionary rule should apply, and it is respectfully submitted that the Court below erred to do otherwise. Moreover, the final test of admissability of other crimes evidence is not to determine whether or not it mechanically fits one of the exceptions to the general rule, but whether or not, after this criteria is met, its probative value outweighs the inherent prejudicial effect. The danger of overlooking this balancing test has been most succinctly stated by Dean McCormick:

> . . . . [I]f the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.
> C. McCormick, *Evidence* Section 190, at 453 (2d ed. 1954)

In balancing the probative value of other crimes evidence against its inherrent prejudicial effect, the trial Court must consider the need for such evidence. If the prosecution has sufficient evidence concerning the crime charged to present the matter to a jury, then the probative value of other crimes evidence would be outweighed by the prejudicial effect, and it should be excluded. In the case at bar, the government presented six witnesses purportedly involved in appellant's alleged gambling operation during the period covered by the Indictment. Additionally, both unindicted co-conspirators testified as to their knowledge, as policemen in the City of Newburgh, of appellant's alleged gambling operation during the same period. It is respectfully submitted that there was sufficient evidence upon which a jury could render its verdict without introduction of the other crimes evidence, and admission of appellant's 1972 arrest and conviction for Promoting Gambling did not serve any proper judicial or prosecutorial function outweighing its inherrent prejudicial effect.

POINT TWO

IT WAS ERROR FOR THE COURT BELOW TO ADMIT IN EVIDENCE FACTUAL INFORMATION AND GAMBLING RECORDS PERTAINING TO APPELLANT'S 1972 ARREST, ON THE GROUNDS THAT THERE WAS NO CONNECTION ESTABLISHED BETWEEN SAID EVIDENCE AND THE INDICTMENT CHARGED, AND INTRODUCTION OF THIS EVIDENCE SERVED ONLY TO PREJUDICE APPELLANT'S DEFENSE.

During trial in the Court below, the Government offered in evidence, and the Court accepted, subject to connection, and over defense counsel's objection, testimony and material evidence pertaining to appellant's arrest in May, 1972 for Promoting Gambling. The Government's Memorandum of Law (A-233-239), submitted at trial indicates that proof of Mr. Skipwith's possession of gambling records on May 12, 1972, and his subsequent conviction based on this possession, were "offered to prove defendant's upper echelon role in an illegal gambling business in which five or more people participated as charged in the indictment". (A-239). Admitted into evidence were gambling records seized from the appellant by the New York State Police on *May 12, 1972* on the premises of 126 Dubois Street, Newburgh, New York (Government's Exhibit 27, A-151); gambling records seized from Griffin and Crews on *May 15, 1972* on the premises of 53 Liberty Street, Newburgh, New York (Government's Exhibits 28, [A-154] 29 [A-156] and 30 [A-157]); testimony of BCI Investigator Tripodo, the arresting officer, (A-145-157, A-166-190); and testimony of FBI Special Agent T.C. Whitcomb (A-191-225).

The Government sought to establish, through the testimony of Special Agent Whitcomb, an expert in laboratory analysis of gambling records, the connection between Government's Exhibit 27 (the 1972 Skipwith records) and Government's Exhibits 28, 29 and 30 (the records seized from Griffin and Crews). On direct examination, Agent Whitcomb testified that, in his opinion, Government's Exhibits 27, 28, 29 and 30 were related to the same operation in the Numbers Policy Business (A-215). However, this opinion was based solely on comparison of

Government's Exhibit 27, (Skipwith), bearing exclusively 1972 dates with those portions of Government's Exhibits 28, 29 and 30 (Griffin and Crews) which were found to be carbon copies of the originals in Government's Exhibit 27. No connection was ever made which placed the appellant in operation of an illegal gambling business during the period covered by the indictment. Amongst the records seized from Griffin and Crews, however, were three policy slips bearing 1971 dates: Government's Exhibit 29-B, found either inside or outside of a desk on the premises of 53 Liberty Street, Newburgh, New York on May 15, 1972 and identified by Agent Whitcomb as two policy slips dated December 6, 1971 and March 16, 1971 (A-207), and Government's Exhibit 30-A, also found on May 15, 1972 on the premises of 53 Liberty Street, Newburgh, New York and identified by Agent Whitcomb as an envelope typical of those used in a numbers operation, bearing the date July 1, 1971 (A-208). The Government, having established through Agent Whitcomb's testimony, appellant's "upper echelon role" in an illegal gambling business in May, 1972, now sought to infer, by means of Government's Exhibits 29 B and 30-A, the ongoing nature of this operation back during the period covered by the indictment. The following portion of the cross examination of Agent Whitcomb is crucial to this contention:

By Mr. Greenblatt:

Q. With respect to the 1971 records in both exhibits, you said you made—

Mr. Bornstein: Indicate the subjects, Mr. Greenblatt.

Mr. Greenblatt: 29-B and 30-A.

Q. Other than being found or being produced with the other exhibits, was there a connection made by you on the basis of handwriting?

A. No, sir.

Q. Was there a connection made by you on the basis of the numberings that you found as being similar to the numberings you found on the other exhibits?

A. No, sir, other than policy entry.

Q. You indicated they are policy entries, is that right?

A. Yes.

Q. But the 1971 writings and the 1972 writings, as I understand it, do not match, is that correct?

A. That is correct.

(A-224-225)

It is respectfully submitted that the only conclusions which could be drawn from the introduction of the aforesaid gambling records, and the testimonies of Investigator Tripodo and Agent Witcomb, were that the records seized from the appellant on May 12, 1972 matched some of the records bearing 1972 dates seized from Griffin and Crews on May 15, 1972; and that the appellant was apparently involved in an illegal gambling business in May, 1972. This involvement was not contested, as the appellant pleaded guilty to the charges stemming from this arrest, (although its introduction in the Court below was highly prejudicial, as discussed herein in Point One). On the other hand, what could *not* be concluded from the aforesaid testimonies and exhibits was any connection between this 1972 illegal gambling operation and the charges covered by the indictment before the Court below. Consequently, they served only to confuse the issue and prejudice appellant's defense, and should not have been admitted.

It is further noted for the purpose of this argument that not only was no connection established between the seized records and Count Two of the indictment, but also the validity of the records themselves are questionable, as no chain of custody was ever established or stipulated to. Owing to the physical nature of the Exhibits, and keeping in mind the inherrent prejudicial effect which they might have if admitted in evidence, it behooves a Court accepting such material *subject to connection* to at least insure that all necessary connections are made. As no proof was ever offered that the Exhibits remained untampered from the time of seizure in May, 1972 to the time of trial in March, 1975, they should not have been admitted in evidence.

POINT THREE

APPELLANT'S CONVICTION IS CONTRARY TO THE WEIGHT OF THE EVIDENCE IN THAT THE GOVERNMENT FAILED TO SUSTAIN THE BURDEN OF PROOF CONTROLLED BY TITLE 18, USC, SECTION 1955.

In order to sustain a conviction for a violation of Title 18, USC, Section 1955, the Government must first prove that the defendant conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business which:

1) is in violation of State Law
2) involves five or more persons, and
3) has been or remains in substantially continuous operation for a period in excess of thirty days, or has a gross revenue of $2,000.00 in a single day.

All three elements must be proven in order for Section 1955 to control. In order to sustain this burden of proof, the Government presented six witnesses: Melvin Allen (A-1-32), George Davis (A-33-61), Louis Wilkins (A-61-79), William Griffin (A-81-97), Willie Crews (A-97-115) and James E. Williams (A-115-135), all of whom admitted to have been gamblers at one time or another in the Newburgh area. It is respectfully submitted that review of these witnesses' testimonies does not sustain the verdict of guilty on Count Two in the Court below. (This argument will confine itself to elements "2" and "3" above, as element "1" is not disputed).

It must be established that during the period covered by the indictment controlled by Section 1955 (See footnote "1" under Statement of Facts), the appellant conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business comprised of five or more individuals. Allen testified that during the later part of 1971 he worked for the appellant, (A-14), and otherwise he worked for Williams directly (A-16). Davis if we accept his Grand Jury testimony, admits that from 1970 to 1973 he worked for Mr. Skipwith (A-38). Wilkins testified that he never dealt with Skipwith, (A-72) but worked

only for Williams (A-75, A-78). Griffin also testified that Williams was his boss (A-86, A-91), and Crews denied any affiliation with either Skipwith or Williams, stating that he turned his slips in to "some white man" (A-103). Thus far, Crews can be eliminated, as his testimony is irrelevant to the issue, Allen and Davis can be considered to have worked for the appellant at some time during the period covered by the indictment, and Griffin and Wilkins worked only for Williams.

Williams testified that at the time of his arrest in February, 1971, he was working for Skipwith *and* he worked out of Poughkeepsie and Kingston. (A-117). He also admits Griffin, Wilkins and Davis were working for *him* (A-120-121), at some time, although he does not place this as to a point in time, nor does he indicate whether or not all three of them were working for him at the same time, or at different times during his lengthy career in the "numbers".

The question remains as to whether Williams is an actual part of an illegal gambling business operated by Skipwith, or an independent operator with associations in Newburgh, Poughkeepsie and Kingston. Special Agent Whitcomb, testifying as an expert on illegal gambling operations, reveals that such independent operators do exist (A-220), and there is nothing in the record to controvert Williams' contention that he operated, as such, out of three separate locales. Moreover, Wilkins and Griffin deny any association with Skipwith, and admit that Williams is their boss (A-75, A-78; A-86, A-91). There is no testimony in the record to support the Government's contention that, during the period covered by the indictment, Williams' operation with Wilkins and Griffin was a part of Williams' association with the appellant, and it is not unreasonable to assume that Wilkins and Griffin were associated with one of Williams' other operations in Poughkeepsie and Kingston. This being the case, only Allen, Davis and Williams can be said to have worked for Skipwith during the period covered by the Indictment. Williams does admit that at the time of his arrest in 1971, there were about seven people turning slips into him (A-120). Nevertheless, his testimony does not indicate which of these persons were associated through Williams to Skipwith, or to Poughkeepsie or

Kingston. In light of Williams' somewhat unique status, it is respectfully submitted that the evidence does not support the Government's contention that Mr. Skipwith's operation consisted of at least five persons during the period covered by the indictment.

Assuming arguendo that this contention may not be upheld, the Government still has the burden of establishing that this illegal gambling business remained in substantially continuous operation for a period in excess of thirty days, or had a gross revenue of $2,000.00 in a single day. As the only witnesses to testify regarding an illegal gambling business in operation during the period covered by the indictment make no mention of gross daily receipts, this portion cannot be sustained. There is, however, the alternate, preceeding clause concerning continuous operation. There is little in the record to reflect definite time periods, although Allen (A-14), Davis (A-38), Wilkins (A-67) and Griffin (A-84) all admit having worked for either Williams or Skipwith during some portion of the period covered in the indictment, with considerable uncertainty, however, as to dates. There is, moreover, no testimony that any of them were working during the same period of time.

Both elements of an illegal gambling business considered here, as defined by Section 1955, turn upon each other. The business must be comprised of five or more individuals, and though it is not necessary for the same five to be involved together over a period of time, the business itself, and at least five persons, must be in substantially continuous operation in excess of thirty days.

Allen testified that he went back to work for Mr. Skipwith sometime in the later part of 1971, (A-14). As the period covered by the indictment only runs to December 31, 1971, and whereas one can as easily assume that the later part of 1971 means December 15, 1971, as October 15, 1971, we can not be certain that Allen was part of an illegal gambling business operating in excess of thirty days during the period covered by the indictment. Davis, if again his Grant Jury testimony is accepted over his testimony at trial, admits an association with the appellant from sometime in 1970 to sometime in 1973 (A-38),

with no discussion as to the relative continuity of this association. Wilkins admits working for *Williams* for two to three months prior to his arrest in February 1971 (A-67) and for an indeterminate period of time thereafter. Griffin admits writing numbers from 1969 to 1973 (A-84), but during the period covered by the indictment, admits his only association is with *Williams* (A-86), and Williams, by his own testimony, was associated with more than one illegal gambling operation (A-117). Williams admits having worked for Skipwith during the period covered by the indictment, and certainly in excess of thirty days (A-118), but again, we do not know how many of the people working for him are part of his association with the appellant, and how many are part of Williams' other associations in Poughkeepsie and Kingston. As reflected in the record, only Davis and Williams can be said to have been associated with an illegal gambling business allegedly operated by the appellant in excess of thirty days, during the period covered by the indictment.

It is the obligation of the Government to sustain the burden of proof as controlled by Section 1955. Each element must be proven, beyond a reasonable doubt, and they must all be concurrently true. It is insufficient to show that the gambling business in question was comprised at a single point in time, of at least five persons, or that the said gambling business existed in excess of thirty days comprised of an indeterminate number of persons. It is respectfully submitted that the record does not sustain either of these elements, or their concurrence, and the judgment in the Court below should be reversed.

CONCLUSION

In view of the prejudicial effect of the other crimes evidence admitted over objection, the failure of the Government to substantiate a connection between this evidence and the period covered by the indictment, and the failure of the Government to sustain the burden of proof controlled by Title 18, USC, Section 1955 the judgment in the Court below rendered by jury verdict on March 13, 1975 should be reversed.

Respectfully submitted,

GREENBLATT & NEUMAN, P.C.
Attorneys for Defendant-
Appellant.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 13 day of June, 19[illegible] at No. [illegible] deponent served the within Brief upon [illegible] attorneys the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me
this 13 day of June 19[illegible]

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973